RE ZAHARULNUDDIN HARUN, EX P HONG LEONG FINANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
STEVE LK SHIM J
[BANKRUPTCY NO: D5-29-400-1998]
16 FEBRUARY 2000

CIVIL PROCEDURE: *Counsel appearing in court - Counsel unauthorised to act as advocate and solicitor - Whether counsel entitled to act as arbitrator advocate instead - Whether sanction from official assignee required as counsel an undischarged bankrupt - Whether counsel could rely on s. 38(1)(f) Legal Profession Act 1976 as appointed arbitrator by parties in dispute*

CIVIL PROCEDURE: *Counsel appearing in court - Counsel an undischarged bankrupt - Need for sanction certificate from official assignee - Counsel requested for sanction certificate from official assignee but there was no response - Whether counsel could invoke s. 86 Bankruptcy Act 1967 to reverse act of official assignee - Whether lack of response from official assignee was not an act done or decision made under s. 86 - Whether s. 86 inapplicable in the circumstances*

This was the judgment debtor's appeal against the decision of the senior assistant registrar ('SAR') dismissing his application in encl. 18 to set aside the bankruptcy notice against him. The SAR had dismissed the application based on the objection of the judgment creditor ('JC') that one, Mr HS Sekhon ('HSS'), who appeared for the JD did not have the *locus standi* to act before the SAR in relation to encl. 18. At that time, HSS, although a lawyer did not have a valid practising certificate and so was not qualified to act as an advocate and solicitor in Malaysia under the Legal Profession Act 1976 ('LPA'). However, HSS claimed that he had conducted the arbitration proceedings prior to the application in encl. 18. As such, he was acting for the judgment debtor ('JD') as an arbitrator advocate and not a solicitor and advocate within s. 3 of the LPA.

Held:

[1] Although HSS maintained that he was competent to act as an arbitrator cum arbitrator advocate, he nevertheless conceded that he was an undischarged bankrupt. As such, he would require a sanction certificate from the official assignee ('OA') to act as an arbitrator or arbitrator advocate.

[1a] Without the sanction certificate from the OA, a bankrupt cannot act either as an arbitrator or as an arbitrator advocate. To act otherwise would be a clear violation of s. 38(1)(a) of the Bankruptcy Act 1967 ('the Act').

[2] Section 86 of the Act envisages a situation where an act or decision has been made by the OA which forms the subject matter of the complaint by a bankrupt, *etc*, and which the court, upon application may confirm, reverse or modify. In this case, it had been alleged that the OA had not done any act or made any decision regarding the request by HSS for a sanction certificate. Therefore, the question of the court confirming, reversing or modifying the act or decision of the OA did not arise. Thus, s. 86 was clearly inapplicable.

[3] In order to fall within the ambit of s. 38(1)(f) of the Legal Profession Act 1976, it must be shown that the arbitrator is one who is appointed by the parties to the dispute.

[3a] The instant proceeding related specifically to an application by the JD to set aside the bankruptcy notice. It was not disputed that the arbitration agreement relied on by HSS was one executed between himself, the JD and a third party. The JC was not involved at all. In the circumstances, it could not be said that HSS was appointed an arbitrator by the parties in dispute. Also, the hire-purchase agreement entered into between the JC and the JD did not contain any arbitration clause. Hence, the question of appointment of an arbitrator did not arise. As such, s. 38(1)(f) did not apply.

[4] This court agreed with the decision of the SAR in holding that HSS did not have the *locus standi* before him in relation to the application in encl. 18.

[Appeal dismissed.]

Case(s) referred to:
Piper Double Glazing Ltd v. DC Contracts [1992] 1 All ER 177 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 38(1)(a), 86
Legal Profession Act 1976, ss. 3, 36(1), 37(1)(a), (b), 38(1)(f)

Solicitors Act 1974 [UK], s. 25(1)

For the judgment debtor - Hardiah Singh Sekhon
For the judgment creditor - AC Chong; M/s Abdullah A Rahman & Co

Reported by Usha Thiagarajah

JUDGMENT

Steve LK Shim J:

This is an appeal by Zaharulnuddin Harun, the judgment debtor (JD) against the decision of the learned Senior Assistant Registrar (LSAR) given on 13 September 1999 dismissing his application at encl. 18 to set aside the bankruptcy notice dated 23 February 1998.

At the outset, I think it appropriate to note briefly the factual circumstances to the application at encl. 18 and this appeal. It seems that Mr. Hardial Singh Sekhon (Mr. HS Sekhon) had been appointed an arbitrator under an arbitration agreement executed between himself, Zaharulnuddin Harun (JD) as well as one Adzzahari Sudin. He apparently conducted the arbitration proceedings relating to disputes between Zaharulnuddin Harun as the applicant and Adzzahari Sudin as the respondent and came out with an interim award. Thereafter, presumably arising out of what was stated in the said interim award, the JD filed a summon-in-chambers at encl. 18 applying to set aside the bankruptcy notice dated 23 February 1998 issued out on the request of the JC. The application at encl. 18 was supported by the affidavit of the JD as well as the affidavit of Mr. HS Sekhon. The record shows that when the said application came up for hearing before the LSAR, Mr. HS Sekhon was appearing for the JD. At the time, Mr. HS Sekhon, although a lawyer, did not have a valid practising certificate and so was not qualified to practise as an advocate & solicitor in Malaysia under the Legal Profession Act. Not surprisingly therefore counsel for the judgment creditor (JC) objected to his *locus standi*. After hearing submissions, the LSAR sustained the objection and thereafter dismissed the said application. Hence this appeal before me.

Clearly the only issue in this appeal concerns the *locus standi* of Mr. H S Sekhon. Mr. H S Sekhon has launched into a lengthy submission citing both foreign and local case authorities in an endeavour to convince this court that he had the *locus standi* to act for and on behalf of the JD in the proceedings before the LSAR.

Central to his case is his contention that he was acting for the JD as an arbitrator advocate and not a solicitor and advocate within the meaning provided by s. 3 of the Legal Profession Act 1976 which states:

> advocate and solicitor and where the context requires means an advocate and solicitor of the High Court admitted and enrolled under this act or under any written law prior to the coming into operation of this Act.

According to him, he was not acting for and on behalf of the JD in what he describes as "a Bar Council advocate". He contends that he is perfectly entitled in law to act as an arbitrator advocate in the instant proceedings citing in support the English case of *Piper Double Glazing Ltd v. DC Contracts* [1992] 1 All ER 177 drawing particular attention to the headnote therein which states:

> Where a party is represented in an arbitration by a person who is not qualified as a barrister or solicitor, but who provides similar services and an award is made providing for payment of that party's cost by the other party or for such costs to be taxed in the High Court if not agreed, the court has proved under RSC O. 62 r. 2(2) to allow the costs of the unqualified person in relation to the conduct of the arbitration. The prohibition in s. 25(1) of the Solicitors Act 1974, against the recovery of costs in respect of anything done by any unqualified person 'acting as a solicitor' does not apply to an unqualified person representing a party in an arbitration since an unqualified person does not 'act as a solicitor' within the meaning of s. 25(1) merely by doing acts of a kind commonly done by solicitors.

Whilst it is clear that the English case cited above dealt essentially with the construction and application of s. 25(1) of the Solicitors Act 1974 in relation to costs claimed by an unqualified person in conducting an arbitration, I am aware that Mr. HS Sekhon is relying on it as establishing what I consider to be a collateral principle that any person who is not a barrister or solicitor can also be appointed as an arbitrator advocate in an arbitration.

In the instant case, although Mr. HS Sekhon has maintained that he was competent to act as arbitrator cum arbitrator advocate, he nevertheless concedes he was an undischarged bankrupt and as such, he would require a sanction certificate from the official assignee to act as an arbitrator or arbitrator advocate. The fact that he could as a bankrupt, be appointed as such, does not mean that he could dispense with the need to obtain the relevant sanction from the official assignee. That is a mandatory requirement. The sanction would be in the form of a certificate issued by the official assignee, I do not think, a bankrupt can act either as an arbitrator or as an arbitrator advocate. To act otherwise would be a clear violation of s. 38(1)(a) of the Bankruptcy Act 1967 which stipulates:

> (1) Where a bankrupt has not obtained his discharge –
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for change in respect of an inquiry to this person) without the previous sanction of the Official Assignee.

Here, Mr. HS Sekhon has admitted that he was (still is) an undischarged bankrupt and that upon being appointed by the JD and another as an arbitrator, he then wrote to the official assignee seeking his sanction. He says that as there was no reply from the official assignee, he had therefore invoked s. 86 of the Bankruptcy Act in appealing to this court by way of summons-in-chambers at encl. 18 apparently seeking an order to reverse the act of the official assignee to make certain declaratory orders.

Now, s. 86 Bankruptcy Act stipulates as follows:

> If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the Official Assignee, we may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

Quite obviously, the section envisages a situation where an act or decision has been made by the official assignee which forms the subject matter of the complaint by a bankrupt, etc, and which the court, upon application, may confirm, reverse or modify. In our case, we have a different scenario. It has been alleged that the official assignee had not done any act or made any decision regarding the request by Mr. HS Sekhon for a sanction certificate. Therefore the question of the court confirming, reversing or modifying the act or decision of the official assignee does not arise. In the circumstances, s. 86 Bankruptcy Act is clearly inapplicable.

As regards his request for declaratory orders, this cannot be entertained by virtue of the provisions of s. 38(1)(a) Bankruptcy Act highlighted above. Mr. HS Sekhon has not obtained the sanction of the official assignee to seek such orders.

Now, Mr. HS Sekhon has also relied on s. 38(1)(f) of the Legal Profession Act as providing him the *locus standi* to act for the JD and these proceedings. To appreciate the full scope and effect of the section, it is, I think, pertinent to also take note of s. 36(1) and s. 37(1)(a) and (b) of the same Act which stipulate respectively as follows:

> 36(1) Subject to this section, no person shall practise as an advocate and solicitor or do any act as an advocate and solicitor or do any act as an advocate and solicitor unless his name is on the Roll and he has a valid practising certificate authorising him to do the act; a person who is not so qualified is in this Act referred to as an 'unauthorised person'.

37(1) Any unauthorised person who –

(a) acts as an advocate and solicitor or agent for any party to proceedings or in any capacity other than as a party to an action in which he is himself a party, sues out any writ, summons or process or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any other person in any of the courts in Malaysia or draws or prepares any instrument relating to any proceedings in any such courts; or

(b) Wilfully or falsely pretends to be, or takes or uses any name, title, addition or description implying that he is duly qualified or authorised to act as an advocate and solicitor, or that he is recognised by law as so qualified or authorised,

shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand five hundred ringgit or to imprisonment for a term not exceeding six months or to both.

38(1) Section 37 shall not apply to –

(f) any arbitrator or umpire lawfully acting under any written law relating to arbitration, settling or attempting to settle the dispute between the parties to the arbitration.

Thus the law relating to the need for anyone practising as an advocate and solicitor in Malaysia to obtain a practising certificate from the Bar Council is statutorily entrenched. In my view the provisions under s. 38(1)(f) of the Legal Profession Act are sufficiently clear. In order to fall within its ambit, it must be shown that the arbitrator is one who is appointed by the parties to the dispute.

In the present case, when the relevant affidavits filed herein and the exhibits annexed thereto are examined in totality, it is clear beyond doubt that the parties in dispute are Hong Leong Finance Bhd, the judgment creditor (JC) and Zaharulnuddin Harun, the judgment debtor (JD). Certainly, the central issue concerns the bankruptcy notice dated 23 February 1998 which was effected on the application of the JC in the wake of a default judgment obtained by the JC against the JD in the Kuala Lumpur Sessions Court on 21 October 1997. Indeed, the instant proceeding relates specifically to an application by the JD to set aside the said bankruptcy notice. Here, it is not disputed that the arbitration agreement relied on by Mr. HS Sekhon is one executed between himself the JD and a third party. The JC was not involved at all. In the circumstances, it cannot be said that Mr. HS Sekhon had been appointed an arbitrator by the parties in dispute. Besides, the hire-purchase agreement entered

into between the JC and JD does not contain any arbitration clause. Hence, the question of appointment of an arbitrator should not arise. In summary, when the factual circumstances as disclosed in the affidavits filed herein are examined closely, I have no difficulty in coming to the conclusion that any reliance by Mr. HS Sekhon on s. 38(1)(f) aforesaid holds no water.

For the reasons stated, I agree with the decision of the LSAR in holding the Mr. HS Sekhon had no *locus standi* before him in relation to the application at encl. 18. Accordingly, I will dismiss the appeal with cost.